PRESIDENT, DISTRICT COUNCIL, BATU PAHAT

v.

LO HONG TAN & ORS.

FEDERAL COURT, JOHOR BAHRU
WAN SULEIMAN FJ
SALLEH ABAS FJ
MOHD. YUSOFF MOHD. J
[CIVIL APPEAL NOS. 221, 222, 223, 224 & 225 OF 1981]
30 JANUARY 1983

ADMINISTRATIVE LAW: *Revocation of business licence - Whether proper - Section 76(1), Town Boards Enactment (Johore).*

The respondent in the first suit ("respondent Lo") and the others were the tenants of premises built before the Second World War and which were controlled premises under the Control of Rent Act. The landlord sent a letter to respondent Lo, stating that the premises were in a ruinous condition. A copy was sent to the appellant. The appellant later issued a notice under s. 76(1) of the Town Boards Enactment (Johore-Cap. 118) stating that the premises were in a ruinous condition and made no reply when the respondent offered to repair the premises at his own expense. The landlord issued a notice to quit and before the expiry of the notice, the appellant revoked the respondent's licence to operate business on the ground that the premises were not fit for human occupation. On an application for an order of *certiorari*, the Judicial Commissioner quashed the appellants order. The appellant appealed.

Held:

[1] The appellate Court was at liberty to consider the evidence and made its own inferences, especially as all the evidence adduced was by affidavit. *[Tithes Dental & Photo Supply Sdn. Bhd. v. Empresa Lineas Maritimes Argentinas & Ors.* [1977] 2 MLJ 13; *Whitehouse v. Jordon* [1981] 1 AER 267].

[2] The discretion given to the appellant under s. 107(2) of the Local Government Act 1976, which replaced part of the Johore Enactment, appears to be unfettered but nevertheless the Court will intervene if it is exercised arbitrarily and improperly.
[*Mohamed Ashraff & Anor. v. The Commissioner for the Federal Capital, Kuala Lumpur* [1972] 2 MLJ 69].
[*Sim Yan Hoo v. Matu And Daro District Council* [1967] 1 MLJ 71]
[*Congrave v. Home Office* [1976] 1 QB 629].

[3] The order of revocation was an improper exercise of the appellant's discretion. A closing order under s. 82(9) of the Act could have properly been made and the respondent asked to leave under s. 82(12), in which case an order revoking the licence would have been unnecessary.

[Appeal dismissed.]

Cases referred to:

Tithes Dental & Photo Supply Sdn. Bhd. v. Empresa Lineas Maritimes Argentinas & Ors. [1977] 2 MLJ 13

Whitehouse v. Jordon [1981] 1 AER 267

Mohamed Ashraff & Anor. v. The Commissioner for the Federal Capital, Kuala Lumpur [1972] 2 MLJ 69

Sim Yan Hoo v. Matu And Daro District Council [1967] 1 MLJ 71

Congrave v. Home Office [1976] 1 QB 629

Legislation referred to:
Control of Rent Act 1966, ss. 18A, (1), (12)
Local Government Act 1976, ss. 82(9), (12), 83, 107(2)
Town Boards Enactment (Cap 118) (Johore), ss. 76, (1)

Other source referred to:
De Smith's Judicial Review of Administrative Action, 4th Edn., pp. 326/327

For the appellant - Teh Poh Teik; M/s. Abdul Rahman Saad & Associates
For the respondents - K.S. Dass; M/s. Wong & Dass

JUDGMENT

Wan Suleiman FJ:

The respondent in Civil Appeal No. 221 of 1981 is the tenant of No. 2-4 Jalan Ampuan, in the heart of Batu Pahat, premises built long before the Second World War, controlled premises under the Control of Rent Act.

The other four respondents are tenants of adjoining shop houses also built at about the same time.

The owner of all these shophouses is one Sharifah Raguan bte Hassan Aljofri.

Since the complaints of the other respondents are basically the same they had agreed to make common cause with the respondent in Civil Appeal No. 221 of 1981 (hereinafter referred to as respondent Lo), who was the applicant before the learned Judicial Commissioner.

Respondent Lo had been in occupation of No. 2-4 Jalan Ampuan for over 16 years at the time of application, carrying on his business and paying rent regularly.

Sharifah (the landlord) desiring to obtain vacant possession had on 26 June 1979 written to respondent Lo (a copy of which was sent to the appellant) stating that the premises were in a ruinous or dangerous state, likely to fall down, which under s. 76(1) of the Town Boards Enactment (Johore - Cap. 118) empowers the President of the District Council, the appellant, to do a number of things, including demolition of the offending premises.

On 10 July 1979 respondent Lo's solicitor replied to the letter stating that the premises were in good habitable condition. Rent was tendered but was refused.

On 30 August 1980 the appellant issued a notice under s. 76(1) of the Enactment stating that the premises were in a ruinous or dangerous condition or likely to fall. On 14 September 1980 respondent Lo's solicitor wrote to the appellant outlining the contention of the respondent, and included an offer by the latter to repair the premises at his own expense. At the same time the appellant's approval was sought for such repairs. No reply was made by the appellant.

On 21 February 1981 the landlord issued a notice to respondent Lo to quit and deliver vacant possession by 31 March 1981. On 26 March 1981, 5 days before the expiry of this notice, the appellant revoked respondent's licence on the ground that the premises were not safe for human occupation.

Following this, water supply to the premises and to the shophouses occupied by the other respondents was disconnected by the JKR. Water supply was restored later subsequent on an application to Court.

The appellant in his affidavit alleged that his cancellation of the licences to operate business had been made after considering two reports, namely one by the Health Department and the second by the JKR dated 27 May 1980.

The learned Judicial Commissioner considered the evidence and expressed his inability to see how the appellant could have come to the conclusion that the premises were in a dangerous state of imminent collapse, leading him to revoke respondent Lo's licence to operate the business on the premises. Though he did not say so explicitly, the general tenor of his judgment and his quashing of appellant's order would make it safe for us to conclude that he agreed with what Counsel for the respondent submitted - that the appellant was biased, or at least that there was real likelihood of bias or real suspicion of bias.

On behalf of the appellant, it was urged that there was ample evidence to justify the decision taken by him and the Town Council.

The report of the Jabatan Kesihatan (pp. 38/39 of the Appeal Record), in particular para. 12 thereof, *serupa dengan yang lain-lain* is amplified in the identical report on the adjoining premises (see p. 40 para. 15 in Record of CA No. 222/81) which reads, "This building is an old building and needs many repairs. Beside that this building was not built according to the modern health conditions and is erected on a substandard shop house lot."

Referring next to the report from the JKR, signed by a Senior Works Engineer (p. 43) the material part reads:

> The said shops are double storey wooden shops with corrugated zinc sheet roof. Their conditions have deteriorated and the pillars are slightly slanting. The poor and deteriorated conditions of the wall can cause them to catch fire easily.

What was considered by the appellant which led to the decision complained of appears in paras. 8 to 14 of his affidavit, (pp. 34 & 35 of the Appeal Record) and corresponding paragraphs in his affidavits in the other appeals. It was emphasized that the decision to cancel the various business licences was first made by the Licence & Health Committee which had its own Chairman (not the appellant) and seven members including ex-officio members, and that the decision of this Committee was then considered and confirmed by the entire Council (of 25 members) under the appellant's chairmanship a week later. In other words the decisions were collective.

On behalf of the respondents, the following matters, we were told, showed bias on the part of the appellant:

(i) the disconnection of the water supply,

(ii) acting on the copy of the letter (at p. 19) sent to the various respondents/tenants asking them to deliver vacant possession on the grounds that the premises were in a dangerous state of disrepair, and

(iii) issuing notice under s. 76(1) of the Town Board Enactment after receiving the letter.

It is well known that an appellate Court is in as good a position to evaluate evidence as the trial Court where the latter has made inferences from findings of fact - see *Tithes Dental & Photo Supply Sdn. Bhd. v. Empresa Lineas Maritimes Argentinas & Ors.* [1977] 2 MLJ 13 and *Whitehouse v. Jordan* [1981] 1 AER 267. Moreover it was emphasized that the trial Court has no special advantage over this Court in that all the evidence adduced was by affidavit.

We therefore are at liberty to consider the evidence and make our own inferences.

We are inclined to agree with learned Counsel for the appellant that the learned Judicial Commissioner had indeed overlooked a number of important facts. Firstly the Health report was not unsigned or undated. It was accompanied by a letter signed by the Pegawai Kesihatan Kanan dated 10 November 1979. Also apart from the relatively innocuous statement that the "cement floor was broken and cracked everywhere", he should have referred to the remarks column in the health reports respecting the adjacent shop houses (that in respect of respondent's shop being "similar to the others"). He would then find reported therein that the building was old, in need of many repairs, not built according to modern health conditions and erected on a substandard shophouse lot.

The Engineer's report is doubtlessly brief but whilst we agree with the learned Judicial Commissioner that it did not state that the premises are in a ruinous or dangerous state of imminent collapse, the report particularly when considered with that portion of the Health Officer's report would reasonably cause the appellant to conclude that it is in a ruinous state, likely to fall or to catch fire, and a danger to both occupant and neighbours - in other words, would justify action under s. 76 of the Enactment.

However, we note that the respondent had in his Originating Notice of Motion prayed for an order of *Certiorari* to quash the appellant's order to revoke the licence of the respondent to carry on business on the premises. (Water having been connected before the hearing, the respondent abandoned the second prayer). We note that the notice of revocation (dated 26 March 1981 at p. 25) mentioned, as a reason for such revocation the finding that the premises were no longer suitable for occupation *(disahkan tidak sesuai bagi diduduki).*

The Local Government Act 1976 was brought into effect in the District Council of Batu Pahat on 28 August 1979, replacing roughly the first half of the Johore Enactment (see the Second Schedule).

Under the law pertaining at the enquiry held by the Council in 1980, therefore, licences may be revoked under s. 107(2) (of the Act) which provides:

> Every licence or permit granted shall be subject to such conditions and restrictions as the local authority may think fit and shall be revocable by the local authority at any time without assigning any reason therefor.

Encik Teh submits and Encik Dass for respondent agrees that the language of this subsection removes the right to be heard, and cites by way of analogy the decision of this Court in *Mohamed Ashraff & Anor v. The Commissioner for the Federal Capital, Kuala Lumpur* [1972] 2 MLJ 69.

There it was held that s. 18A of the Control of Rent Act 1966 leaves no discretion with the Commissioner upon proof of compliance with s. 18A(1) - (a) planning permission having been granted; (b) availability of funds and (c) written undertaking to commence development work within 6 months of date of possession. In the absence of any provision as to the mode of enquiry, no question of failure to observe the principles of natural justice can arise, the Commissioner's function under the section being purely administrative and not answerable to *certiorari.*

We note that s. 18A (12) aims at excluding intervention by the Courts and reads;

> Any order made by the Commissioner under this section shall be final and conclusive and shall not be questioned in any Court.

Counsel in addition submitted that the decision of Lee Hun Hoe J (as he then was) in *Sim Yan Hoo v. Matu And Daro District Council* [1967] 1 MLJ 71 can be distinguished because there the right to be heard has been provided by statute.

We feel that it would not be inappropriate to say that the right to be heard may exist, in certain circumstances, without express statutory provision therefor.Even where a discretion such as that given to the appellant by s. 107(2) appears to be unfettered, the Courts will intervene if it is exercised arbitrarily and improperly - see *Congrave v. Home Office* [1976] 1 QB 629.

An enlightening passage is to be found at pp. 326/327 of de Smith's *Judicial Review of Administrative Action*, 4th Edn., which reads as follows:

> If a discretionary power is conferred without reference to purpose, it must still be exercised in good faith and in accordance with such implied purposes as the Courts attribute to the intention of the Legislature. The Minister who, in reliance on an ostensibly unfettered discretionary power, refused to refer a complaint by milk producers to a committee of Investigation because this might lead him into economic and political difficulties, was held to have violated the unexpressed purpose for which the power of reference had been conferred and (according to a somewhat hyperbolical interpretation of their Lordship's comments) "was roundly rebuked by the House of Lords for his impudence". In order to avoid paying an announced (but not yet enacted) increase in the fee for a television licence, some licence-holders obtained another licence at the old rate before their existing licence expired. The Court of Appeal held that the Minister could not use his power to revoke licences in order to deprive licencees of the advantage that they had secured from the gap between the Government's announcement and Parliamentary authorisation of the change in fees.

We note from his affidavit that the respondent in Civil Appeal No. 222 of 1981 had argued that the proper course for the appellant to take would have been to get the Landlord to herself put the premises into a habitable condition.

Under the provisions of the Act which by the time the enquiry was held had become applicable a closing order under s. 82(9) of the Act could have properly been made in which case the respondent as occupier could have been asked to leave under s. 82(12).

It is not disputed that respondent had, through his solicitor offered to repair the premises, an offer to which appellant did not deign to reply. At the time of his filing the affidavit (June 1981), and indeed up to the time the appeal was argued in September 1982 it would appear that no closing order, or no order of demolition under s. 83 had been issued.

Had such orders been made, an order revoking the licence would obviously have been unnecessary. Whilst we would hesitate to say that we have found that the allegation of bias, the burden of which lies on respondent has been proved, we are satisfied that the order of revocation is an improper exercise of his discretion similar to that in *Congrave's* case and that *certiorari* would lie.

We would therefore affirm the order made by the learned Judicial Commissioner, albeit for a different reason.

The appeal is dismissed, and since the other respondents have had their licences revoked in similar circumstances, the appellant's order revoking all the licences are hereby quashed. The appellant to pay costs here and in the Court below on the higher scale.

Also found at [1983] 1 CLJ 175